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Head of Euro and Settlement, and EU Settled Status Customer Resolution Centre
Visa and Citizenship Operations
UK Visas and Immigration
Home Office

By email only

7 January 2022

Dear Gabi,

We are writing in relation to the issue that unmarried partners of EEA nationals who were in a durable relationship by 31 December 2020, resided in the UK without immigration permission, and failed to comply with the formality of making an application for a document under the EEA Regulations by 31 December 2020, are excluded from the EU Settlement Scheme. We understand that a large number of EEA nationals and their durable partners are affected by this provision and that there are now numerous appeals pending before the First-tier Tribunal where such durable partners applied under Appendix EU without holding a residence document issued under the EEA Regulations 2016.

The Rules as they are currently drafted are such that durable partners who do not hold a residence document granted under the EEA Regulations 2016 are eligible for pre-settled status as joining family members once they have broken their continuous period of residence eg by an absence from the UK otherwise than for an important reason of at least six months or, curiously, a period of imprisonment of any length. In our view, the need to break continuity of residence constitutes an unnecessary and disproportionate administrative burden that interferes with the EEA national's exercise of free movement rights. Furthermore, we note that the durable partner never technically commenced a continuous period of residence under EU law (precisely for the reason the Home Office requires durable partners to hold residence documents issued under the EEA Regulations 2016) so it is not clear how or why they should be required to break such a continuous period of residence.

Given that durable partners (where the relationship existed by 31 December 2020) fall within the scope of the Withdrawal Agreement, the added document requirement that penalises those in the UK without immigration status before 2021 creates arbitrary and discriminatory results and is unreasonable and disproportionate in our view.

Application made by 31 December 2020 under Appendix EU rather than under EEA Regulations 2016

We are aware of numerous cases where durable partners applied prior to the end of the transition period; however, rather than using the application form for a Residence Card under the EEA Regulations 2016, they applied for status under the EU Settlement Scheme.

This cohort of applicants clearly intended to apply for confirmation and protection of their rights of residence under EEA free movement law and the Withdrawal Agreement. We understand that the reasons for applying directly under the EU Settlement Scheme included that even where people were legally represented it had not been appreciated (given the complexity of the pre- and post-Brexit transition period provisions) that durable partners were required to first apply for a document under the EEA Regulations by 31 December 2020.

The difficulties in understanding the effect of the provisions were compounded by the fact that the Home Office's own communication around this issue was misleading. For example, we are aware of a case where a person applied for pre-settled status on 30 December 2020 using a paper application form due to a lack of an ID document (from which it could have been inferred that they were highly unlikely to have had a Residence Card as this would have been sufficient proof of identity and nationality without the need for a paper form). The durable partner and their legal representative spoke to the EU Resolution Centre on multiple occasions and explained the circumstances of the case – at no point were they alerted to the requirement to first apply for a Residence Card. Instead, they were provided with an EU Settlement Scheme paper application form for family members of EEA nationals unable to provide evidence of identity and nationality.

Recommendation

We recommend that the Secretary of State for the Home Department treats any such application for status under the EU Settlement Scheme made by the 31 December 2020 deadline as an application for a Residence Card made under the EEA Regulations 2016. As explained below, it is our view that this would reflect the true position which ought to be accurately communicated to the affected cohort of applicants.

Referring to the authority of Barnett and others (EEA Regulations: rights and documentation) Jamaica [2012] UKUT 142 (IAC), the Upper Tribunal in Rehman (EEA Regulations 2016 – specified evidence) [2019] UKUT 195 (IAC) held at paragraph 21 that *“the ‘supporting documents required’ cannot go beyond the requirements of the Directive or what is strictly necessary to establish the relevant right of residence under European Union law.”* Furthermore, the Tribunal clarified at paragraph 28 that *“provisions introduced for administrative convenience must not go beyond what is required to establish a right of residence”*.

Article 10(2) of Directive 2004/38/EC provides a list of documentary evidence required for a family member of a Union citizen to be issued a Residence Card. Importantly, it does not require the use of a particular application form.

It is therefore not open to the Home Office to argue that because a person has not used the required application form they have not made a valid application under the EEA Regulations when they applied under the EU Settlement Scheme. In line with Rehman, any such requirement would go beyond the requirements of Directive 2004/38/EC and what is required to establish a right of residence.

Alternatively, it is our view that the Secretary of State for the Home Department ought to exercise her discretion under Regulation 21(6) of the EEA Regulations 2016 and disapply the

requirement to have used the specified application form. Regulation 21(6) provides the important safeguard that, where there are circumstances beyond the control of the applicant, the Secretary of State for the Home Department may exercise discretion over whether to accept an application under the EEA Regulations 2016 or not. On the basis that neither the Home Office website nor the EU Resolution Centre when directly asked warned people in these circumstances of the requirement to apply for a Residence Card under the EEA Regulations 2016 first, the requirement ought to be disapplied.

We would be grateful for your confirmation of the Home Office's position in relation to this issue and look forward to hearing from you.

Yours sincerely,

Zoe Bantleman, Legal Director, ILPA

Luke Piper, Head of Policy and Advocacy, the3million

Mala Savjani, Policy Officer, Here for Good